87-1574

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LUHR BROS., INC.,
Petitioner,

vs.

JAMES DALE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FOR THE FIFTH DISTRICT

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QUESTIONS PRESENTED

1. Whether a maritime construction worker, who falls within the legislative definition of a "longshoreman" under the Longshore and Harbor Workers' Compensation Act (LHWCA) and regulations issued thereunder, has a cause of action under the Jones Act?

2. Whether the Illinois appellate court's 2 to 1 majority opinion, affirming an award of liability damages to Respondent under the Jones Act, was in direct conflict with this Court's judicial interpretation of who is a "crewmember" for purposes of Jones Act coverage, set forth in *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 241 (1940) and *Senko v. LaCross Dredging Corp.,* 352 U.S. 370 (1957)?

3. Whether this Court should fashion a uniform rule, for lower courts to apply in determining whether injuries to maritime workers should be compensated under the LHWCA or the Jones Act, in order to resolve the conflicts which exist between the circuits in:

a. deciding whether or not to begin their analysis by examining the definitions of employees contained in the LHWCA and the regulations issued thereunder, and

b. judicially defining which employees are "crewmembers" covered by the Jones Act?

RULE 28.1 LIST

Petitioner owns partial interest in Construction Aggregate Supply, Inc., and Port Allen Shell and Limestone, Inc., and is a partner of Midwest Construction Company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other:

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Petitioner respectfully prays that a writ of certiorari issue to review the opinion of the Appellate Court of Illinois for the Fifth District, entered in this proceeding on July 29, 1987.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois for the Fifth District is reported at 110 Ill. Dec. 756, 511 N.E. 2d 933, and is printed in the appendix hereto. Also printed in the appendix are the unreported order and judgment of the Associate Circuit Judge for St. Clair County, Illinois, the order of the Appellate Court of Illinois denying the Petition for Rehearing, and the order of the Illinois Supreme Court denying the Petition for Leave to Appeal.

JURISDICTION

The divided opinion of the Appellate Court of Illinois for the Fifth District was entered on July 29, 1987. A timely Petition for Rehearing, and Application for Certificate of Importance, were denied on August 18, 1987. The Illinois Supreme Court denied a timely Petition for Leave to Appeal on December 22, 1987. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

STATUTES AND REGULATIONS INVOLVED

33 U.S.C. §902. Definitions.

* * *

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . .

29 C.F.R. 1918. 3(i).

> The term "longshoring operations" means the loading, unloading, moving, or handling of cargo, ship's stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States.

33 U.S.C. §904. Liability for Compensation.

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under Sections 907, 908, and 909 of this title. * * *

33 U.S.C. §905. Exclusiveness of Liability.

> (a) Employer liability . . .
> The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . .

46 U.S.C. §688. Recovery for injury to or death of seaman.

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . .

STATEMENT OF THE CASE

In June of 1983, Respondent, a heavy equipment operator who divided his time between land and river construction projects, was assigned by Petitioner to work on a project which required rock to be placed along a section of riverbank on the Mississippi River, to prevent erosion. Respondent's job was to unload rock from barges with a crane, and place the rock on the riverbank.

The crane rested on the deck of a work barge called the L-1000, which sat next to the bank. A tug brought barges loaded with rock to the work site for Respondent to unload, and removed the empty barges after Respondent finished unloading them.

Respondent had no duties with respect to the work barge itself. He did not handle any lines, did not clean or maintain the barge, did not repair leaks or perform any pumping, and did not ever raise or lower the L-1000's mooring "spuds" when it needed to be moved.

The L-1000 spent 90 percent of its time sitting in one spot, for one to four hours at a time. Respondent's sole responsibility during that time was to unload rock with the crane.

When enough rock was unloaded in a particular spot, and the work barge needed to be repositioned, a tug manned with its own crew moved it 90 to 95 percent of the time. Respondent radioed the tug to advise the pilot where he wanted the work

barge moved, and signaled a winchman to raise the mooring spuds when the tug arrived. Respondent did not tell the pilot how to operate the tug, and did not handle any lines in connection with any of the movements.

About 5 percent of the time, the position of the L-1000 was adjusted a short distance downstream without the use of the tug. To accomplish this, Respondent would drop the bucket of the crane onto the river bottom, and ask the winchman on the work barge to raise the mooring spuds. After the L-1000 drifted a short distance, the winchman would drop the mooring spuds to halt its movement. This method of repositioning the L-1000 was usually used only on occasions when the barge needed to be moved distances of about 20 or 30 feet.

Respondent testified he was climbing up to the cab of the crane at the beginning of his shift on July 11, 1983, when his left foot slipped on the crane track. He testified he lost his grip on the handhold on the side of the cab and fell backward onto the deck of the barge. When he fell, Respondent aggravated a prior injury to his low back and thereafter underwent an operation to "fuse" two of his vertebrae, which was only partly successful.

After initially receiving weekly fixed compensation benefits, Respondent filed suit in the Circuit Court of St. Clair County, Illinois, alleging he was entitled to recover unspecified damages as a Jones Act seaman. Petitioner contended in its Answer, at trial, and in its post-trial brief, that Respondent was a longshoreman not entitled to recover damages under the Jones Act. On July 28, 1986, Associate Circuit Judge Robert Craig entered an Order finding the Respondent to be a seaman, and awarding him $1,654,704 for his injury.

The trial judge noted that Respondent sometimes asked the winchman to raise the mooring spuds in order to let the work barge drift by itself when the tug was "not around." From this, he concluded Respondent was aboard the work barge "primarily to aid in navigation" (Appendix p. A-14) and accordingly was

covered by the Jones Act. The trial judge's decision did not discuss the Longshore and Harbor Workers' Compensation Act (LHWCA), or even acknowledge its existence.

Petitioner appealed to the Appellate Court of Illinois for the Fifth District, contending the Circuit Court award should be overturned because Respondent was not a seaman. On July 29, 1987, a three judge panel of the appellate court voted 2 to 1 to affirm the Jones Act award, even though the same appellate court held, less than 11 months earlier, that longshoremen such as Respondent are not covered by the Jones Act. *Dungey v. United States Steel Corp.*, 101 Ill. Dec. 957, 499 N.E.2d 545 (5 Dist. 1986), cert. den. ____ U.S. ____, 108 S.Ct. 75 (1987).

The Illinois appellate court's majority opinion seized on the fact that Respondent was the one who radioed the tug to come and reposition the barge, once Respondent finished unloading rock along a particular stretch of river bank, and that Respondent was the one who asked the winchman to raise the spuds. The majority concluded, based on this evidence, that Respondent "made a significant contribution to the . . . transportation function of the vessel" because he was responsible for "directing" the employees on the tug and the work barge to reposition the barge. 110 Ill. Dec. at 758-759, 511 N.E.2d at 938-39. The appellate court majority's analysis, like that of the trial court, excluded any reference to the LHWCA.

In a dissenting opinion, Justice Karns stated Respondent was not a seaman because his primary job was to unload cargo and he made no contribution to any "transportation function" of a vessel which could be deemed "significant." 110 Ill. Dec. at 761, 511 N.E.2d at 938.

Petitioner continued to urge the absence of seaman's status by filing a Petition for Rehearing in the appellate court, followed by a Petition for Leave to Appeal to the Illinois Supreme Court, both of which were denied.

REASONS FOR GRANTING THE WRIT

I. The decision of the Illinois appellate court conflicts with Congress' legislative determination that "longshoremen" or "person[s] engaged in longshoring operations" are employees whose exclusive remedy is compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA).

A . The history and purpose of the Longshore and Harbor Workers' Act (LHWCA).

Congressional efforts to enact a maritime workmen's compensation statute began immediately after *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917) in which this Court held that states could not constitutionally compensate harbor workers injured on vessels afloat on navigable waterways of the United States under their workmen compensation statutes. On October 6, 1917, Congress amended the Savings to Suitor clause in the Judiciary Act which granted to district courts "jurisdiction of all civil causes of admiralty in maritime jurisdiction." The amended statute reserved to harbor workers injured in the course of their employment both the "rights and remedies under the workmen's compensation law of any state." Act of October 6, 1917, Ch. 97, 40 Stat. 395. This effort to extend state workmen's compensation remedies to harbor workers foundered when this Court held in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) that the statute was an impermissible delegation of legislative power by Congress.

Subsequently, on June 10, 1922, Congress again sought to extend state workmen's compensation remedies to harbor workers. It again amended the Savings to Suitor clause to preserve:

> To claimants for compensation for injuries to or death of persons other than the masters or member of a crew of a

> vessel their rights and remedies under the workmen's compensation law of any state . . . Act of June 10, 1922, Ch. 216, 42 Stat. 634.

This effort met the same fate as did its predecessor in *Knickerbocker*, when in *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924) this Court held again that the law was an impermissible delegation of legislative power by Congress to the states.

In 1920, after *Knickerbocker* but prior to passage of the LHWCA in 1927, Congress enacted the Jones Act, 46 U.S.C. §688. It granted to "seamen" injured in the course of their employment an action for damages based on negligence. Congress did not define who were "seamen" covered by the Jones Act. Prior to the passage of the LHWCA in 1927, this Court concluded that the term "seaman" should be given a flexible meaning and concluded that a longshoreman was a seaman for purposes of the Jones Act. *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926).

Ultimately, on March 4, 1927, Congress passed the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901-950. The original statute provided federally administered compensation benefits for work-related injury or death which occurred on navigable waters. The Act did not define which employees were covered, except in the negative sense of excluding "a master or member of a crew." 33 U.S.C. §902(3) (1927 Act).

Legislative history to the 1927 Act reveals both its purpose and the class of workers who were its intended beneficiaries. The Senate Report on the statute stated:

> The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting and repairing ships; but it should be remarked that injuries occurring in

> loading or unloading are not covered unless they are on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States. (S.R. No. 973, 69th Cong., 1st Sess. 16 (1927)).[1]

The House Report on the bill confirms that Congress viewed a worker's compensation scheme as a preferred method for providing workers, injured in the course of maritime employment, with prompt and certain compensation.

> Workmen's compensation has come to be universally recognized as a necessity in the interest of social justice between employer and employee. It is the modern substitute for the old common-law remedy afforded through actions at law for damages, and promptly affords relief to the injured employee by furnishing medical attendance and supplies immediately upon the occurrence of the injury or as soon thereafter as possible and compensation during the period of his illness or inability to pursue his usual employment, and in the case of death, financial assistance to his dependents, without the delay and expense which an action at law entails. (H.R. No. 1767, 69th Cong. 2nd Sess. 19-20 (1927)).

See also *Nogueira v. New York N.H. & H.R. Co.*, 281 U.S. 128, 136 (1930).

Passage of the original LHWCA immediately served to restrict, in part, the category of workers who qualified for seaman status under the Jones Act. This Court has recognized

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[1] Legislative history to the 1922 Act, declared unconstitutional in *Washington v. W.C. Dawson & Co., supra*, provides additional guidance as to the individuals whom Congress considered the beneficiaries of the Act. The Senate and House reports repeatedly refer to longshoremen, shiprepairers or workers engaged in loading or unloading vessels. S.R. No. 94, 67th Cong. 1st Sess. (1921); H.R. No. 639, 67th Cong., 2nd Sess. (1922).

that the LHWCA legislatively overturned the expansive view, announced in *International Stevedoring Co. v. Haverty, supra*, that longshoremen and other harbor workers could be seamen for purposes of the Jones Act. See *Swanson v. Marra Bros.*, 328 U.S. 1 (1946).

In 1972, Congress substantially amended the LHWCA. The test of eligibility for compensation was expanded both as to the "situs" of the injury, to include certain areas adjoining navigable waters, and the "status" of the injured employee, requiring only that the injured worker be "engaged in maritime employment." See *Director, Etc. v. Perini North River Associates*, 459 U.S. 297, 314 (1983). Perhaps of greatest significance, for purposes of this case, was the fact that in the 1972 amendments Congress provided, for the first time, a positive definition of several of the categories of employees it intended to be covered by the LHWCA. As stated by this Court:

> [The 1972 amendments] . . . added the requirement that the injured worker be 'engaged in maritime employment,' *which it defined to include* 'any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker . . .' *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 264 (1977). (Emphasis added.)

In summary, the legislative history and the statute itself reveal that by passage of the LHWCA, after the Jones Act, Congress: (1) made compensation benefits the exclusive remedy for maritime employees injured in the course of their employment, including many employees which this Court previously considered to be "seamen" within the Jones Act, excepting only "a master or member of a crew of any vessel;" and (2) preferred an automatic compensation scheme, as opposed to liability suits for damages. The amendments in 1972 served to broaden and expressly define certain of the classifications of employees it covers, whereas the Jones Act contains no such legislative

definition. This Court has not directly considered the interrelationship between the LHWCA and the Jones Act since well before passage of the 1972 amendments. See Part II *infra.*

B. The LHWCA is the exclusive remedy for employees who are within its coverage.

In the original LHWCA, and the 1972 amendments thereto, Congress left no room for doubt that the remedy provided by the statute was intended to be exclusive for those workers within its coverage. 33 U.S.C. §905. Thus, a person injured in the course of his employment on a navigable waterway is either an "employee" covered by the LHWCA or a seaman under the Jones Act. A worker cannot be both an employee under the LHWCA, and at the same time be entitled to sue for damages as a seaman under the Jones Act, since the two statutes are mutually exclusive. *Swanson v. Marra Bros., supra; Pizzitolo v. Electro-Coal Transfer Corp.,* 812 F.2d 977 (5th Cir. 1987), cert. den. ____ U.S. ____ (1988).

Similarly, railroad workers injured on vessels afloat on navigable waters are covered exclusively by the LHWCA and cannot sue under the Federal Employee's Liability Act (FELA) 45 U.S.C. §51 *et. seq.,* upon which the Jones Act was based. *Nogueira v. New York N.H. & H.R. Co.,* 281 U.S. 128 (1930); *Pennsylvania R. Co. v. O'Rourke,* 344 U.S. 334 (1953).

C. Respondent Dale was an employee within the meaning of 33 U.S.C. §902(3).

As noted above, in 1972 Congress defined "maritime employment" as including "longshoremen" or individuals engaged in "longshoring operations." Longshoremen have long been understood to mean workers engaged in loading or unloading cargo from vessels. *Northeast Marine Terminal Co., Inc. v. Caputo, supra;* S.R. No. 973 at p. 16.

Regulations, promulgated by the Secretary of Labor pursuant to the authority of the LHWCA, 33 U.S.C. §939(a), defined "longshoring operations" as ". . . the unloading . . . of cargo . . . out of any vessel on the navigable waters of the United States." 29 C.F.R. §1918.3(i). These regulations have the force of law. *Pearce v. Director, Office of Wks. Compensation,* 647 F.2d 716, 726 (7th Cir. 1981).

Plainly, Respondent fits either or both categories. Respondent's employment duties were of the exact type defined as longshoring work by Congress and the Department of Labor. Ninety percent of the Respondent's workday was spent in the cab of his crane "unloading cargo" (rock) "out of vessels" (barges brought to the site by a tug).

In fact, the duties of Respondent in this case were almost identical to those of the injured employee who this Court found to be a longshoreman in *Director Etc. v. Perini North River Associates,* 459 U.S. 297 (1983):

> . . . caissons were . . . loaded onto supply barges and towed across the river to await unloading and installation.
>
> The injured worker . . . was an employee of Perini in charge of all work performed on a cargo barge used to unload caissons and other materials from the supply barges and to set caissons in position. . . 459 U.S. at p. 301.

D. The opinion of the Illinois appellate court conflicts with the express language of the LHWCA and judicial interpretations of it.

In *United States v. James,* 478 U.S. 597 (1986), this Court summarized the correct principles for statutory interpretation.

> The starting point in statutory interpretation is 'the language of the statute itself.' We assume that the legislative purpose is expressed by the ordinary meaning of the words used.

* * *

> We have repeatedly recognized that when * * * the terms of a statute are unambiguous, judicial inquiry is complete except 'in rare and exceptional circumstances.' In the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regared as conclusive.' (478 U.S. at ____) (106 S.Ct. at 3121-22) [Citations omitted]

This Court has long acknowledged the power of Congress to legislate in respect of matters within admiralty and maritime jurisdiction. *Knickerbocker Ice Co. v. Stewart, supra.* It has also recognized, in its interpretation of other maritime remedial legislation enacted by Congress, that "when [Congress] does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625 (1978).

In 1972, Congress determined that "longshoremen" or those engaged in "longshoring activities" were to be compensated exclusively by the LHWCA if, like Respondent, they were injured on a navigable waterway as defined in 33 U.S.C. §903(a). Because Respondent's duties placed him within the plain meaning of the LHWCA, he could not *ipso facto* be a "master or member of a crew" under the Jones Act. To hold otherwise eviscerates the statute.

In *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), the U.S. Court of Appeals for the Fifth Circuit extensively reviewed the legislative history of the LHWCA, including the 1972 amendments. The court concluded the intent of Congress was obvious.

> Congress could have hardly made it clearer that it intended to afford complete coverage to employees engaged in the occupations enumerated in the Act so long as the location

> of the injury met the situs test. (*Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d at 982.)

The Fifth Circuit held, therefore, when an employee is defined in the LHWCA, that should be determinative of his status; the employee cannot sue under the Jones Act.

> [B]ecause longshoremen, shipbuilders and ship repairers are engaged in occupations enumerated in the LHWCA, they are unqualifiedly covered by that Act if they meet the Act's situs requirements; coverage of these workmen by the LHWCA renders them ineligible for consideration as seamen or members of the crew of a vessel entitled to claim the benefits of the Jones Act. *Id.* at 983.

In the present case, the majority opinion of the Illinois appellate court ignored the fact that Respondent's job of unloading cargo was specifically defined as "longshoring"work within the LHWCA. The majority failed to discuss the LHWCA at all in its opinion. As a result, the appellate court's holding is in conflict with the LHWCA, because it affirms a Jones Act damage award to an employee Congress chose to compensate under the LHWCA.

II. The Illinois appellate court's 2 to 1 majority opinion, holding Respondent to be covered by the Jones Act, was in direct conflict with this Court's interpretation of Jones Act coverage in *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940) and *Senko v. LaCross Dredging Corp.*, 352 U.S. 370 (1957).

Assuming arguendo the Illinois appellate court was justified in ignoring the LHWCA altogether and proceeding, as it did, to examine Respondent's status solely with reference to the Jones Act, the ultimate conclusion of the majority conflicted with this Court's holdings in *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940) and *Senko v. LaCross Dredging Corp.*, 352 U.S. 370 (1957).

This Court held in *Bassett* that a worker unloading cargo on a vessel, who was not "primarily on board to aid in her navigation" (309 U.S. at 260), was entitled to seek compensation for injury under the LHWCA, but could not sue under the Jones Act. Bassett's job was to unload cargo (coal) from a "lighter" onto various vessels owned by his employer. He occasionally tied off or released lines.

This Court held that such workers, engaged in unloading cargo from one vessel to another, were intended by Congress to be compensated under the LHWCA and *not* the Jones Act:

> That is our concern here in construing this particular statute — the Longshoremen's and Harbor Workers' Compensation Act — with appropriate regard to its distinctive aim.
>
> * * *
>
> This Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Company v. Haverty, supra*), were still regarded as distinct from members of a 'crew.' They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation.
>
> * * *
>
> . . . the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, . . . he had no duties while the boat was in motion, . . . he slept at home and boarded off ship and was called each day as he was wanted, and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in

> the position of 'ongshoremen or other casual workers on the water.' (309 U.S. at 259-260.)

Similarly, this Court held in *Senko*[2] that there was a reasonable evidentiary basis for the issue of Jones Act status to be submitted to a jury if, but only if, the injured worker's duties dealt "primarily" with maintenance of a vessel and/or where the worker had a "significant navigational function" when the vessel was in transit." See 352 U.S. at p. 374.

In the present case, Respondent was not aboard any vessel "naturally and primarily . . . to aid in her navigation." Nor did he have "primary" or "significant" duties relating to maintenance or navigation of any vessel while "in transit." Instead, Respondent spent virtually his entire work day unloading cargo from barges and placing it on the river bank. The work barge, on which his crane was positioned, remained stationary at all times while Respondent was performing his primary duties of unloading cargo.

The Illinois appellate court's majority opinion, holding that Respondent was entitled to sue under the Jones Act, conflicted not only with *Bassett* and *Senko* but also with other extensive maritime authority, including: the U.S. Court of Appeals for the Seventh Circuit in *Johnson v. John F. Beasley Const. Co.*, 742 F.2d 1054 (7th Cir. 1984), cert. den. 496 U.S. 1211 (1985) (holding that an ironworker supervising the unloading and placement of steel beams off the deck of a construction barge could not sue under the Jones Act); a recent decision of a different panel of this same Illinois state appellate court in *Dungey v. United States Steel Corp.*, 101 Ill. Dec. 957, 499 N.E.2d 545 (5 Dist. 1986), cert. den. ____ U.S. ____, 108 S.Ct. 75 (1987) (holding that a mechanic on a crane barge at a river construction project was not covered by the Jones Act); and decisions from

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[2] *Senko* was the last case from this Court which directly addressed the status issue vis a vis the Jones Act.

numerous other jurisdictions holding that crane operators who primarily unload cargo and only incidentally help move barges or handle lines do not have a cause of action under the Jones Act. See *McSweeney v. M.J. Rudolph Corp.*, 575 F.Supp. 746 (E.D.N.Y. 1983); *Lynn v. Heyl and Patterson, Inc.*, 483 F.Supp. 1247 (W.D.Pa. 1980) aff'd 636 F.2d 1209 (3rd Cir. 1980); *Bellomy v. Union Concrete Pipe Co.*, 297 F.Supp. 261 (S.D.W.Va. 1969) aff'd 420 F.2d 1382 (4th Cir. 1970) cert. den. 400 U.S. 904 (1970); *Richardson v. Norfolk Shipbuilding & Drydock Corp.*, 479 F.Supp. 259, 265 (E.D.Va. 1979) aff'd 621 F.2d 633 (4th Cir. 1980).

The fact Respondent radioed a tug when the L-1000 needed to be repositioned did not mean he was aboard "primarily to aid in navigation," or that he had "significant" navigational duties while in transit, because the task of radioing the tug, and telling the pilot where the work barge should be placed, would have only taken a few seconds and had nothing to do with navigation of the tug itself. Although Respondent occasionally asked the winchman to let the work barge drift a short distance downstream so that he could unload rock onto a different part of the river bank, courts have held that short drifting movements of vessels, which are otherwise utilized primarily as work platforms, do not constitute "navigation" for purposes of determining Jones Act status. See *Buna v. Pacific Far East Line, Inc.*, 441 F.Supp. 1360, 1364-65 (N.D.Cal. 1977); *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643, 648 (1st Cir. 1973), cert. den. 414 U.S. 856 (1973); *McNeill v. J.E. Brenneman Co.*, 1986 A.M.C. 2241, 2249 (E.D.Pa. 1983).

III. The Court should grant certiorari in this case, and adopt a uniform rule for determining how the LHWCA statutory provisions and regulations should be applied in determining the status of maritime workers, both to correct the conflict between the circuits in defining who is a "seaman," and to correct the conflict between the circuits in their approach to the issue.

A. The conflict in defining "seaman."

A clear conflict exists between the circuits in attempting to judicially define who is a "seaman" under the Jones Act. Some courts, including the U.S. Courts of Appeal for the Second Circuit and Fourth Circuit, generally follow *Bassett* and *Senko* and hold that a worker must "primarily aid in navigation" of a vessel in order to be a seaman. See *Klarman v. Santini,* 503 F.2d 29, 33 (2nd Cir. 1974), cert. den. 419 U.S. 1110 (1975); *Bellomy v. Union Concrete Pipe Co., supra.* Other courts, including the U.S. Court of Appeals for the Fifth Circuit, hold that anyone who "contributes to the mission" of a vessel is a seaman. See *Offshore Co. v. Robison,* 266 F.2d 769 (5th Cir. 1959). The Third Circuit, Seventh Circuit, and the Illinois appellate court which heard this case, presently hold that a seaman is someone who makes a "significant contribution to the transportation function" of a vessel. See *Simko v. C & C Marine Maintenance Co.,* 594 F.2d 960, 964-965 (3rd Cir. 1979), cert. den. 444 U.S. 833 (1979); *Johnson v. John F. Beasley Const. Co., supra; Dungey v. United States Steel Corp., supra.*

Although the Illinois test seems to adhere more closely to *Bassett* and *Senko,* than does the more liberal *Robison* test, it still creates problems. By not restricting the "seaman" label to those who work aboard a vessel while "in transit" (*Senko,* 352 U.S. at 374), Illinois has mistakenly applied the Jones Act to various LHWCA-type harbor workers, including ship repairmen who merely repair barges in-between voyages, see *Berry v. American Commercial Barge Lines,* 71 Ill.Dec. 1, 450

N.E.2d 435 (5th Dist. 1983), and longshoremen who primarily unload cargo in a confined geographical area, whose only "contribution to transportation" is calling a tug to move a work platform in order to unload at a slightly different location. *Dale v. Luhr Bros., Inc., supra* (this case).

Recently, two Justices recognized the need for this Court to grant certiorari to correct the conflict between the various jurisdictions in defining who is a seaman. *International Oilfield Drivers, Inc. v. Pickle,* ____ U.S. ____, 107 S.Ct. 939 (1987).

B. The Conflict in Approach.

Another problem, and one which is potentially much more serious than the lack of uniformity in defining the term "seaman," is that the circuits also conflict in their basic approach to resolving the choice between the LHWCA and the Jones Act. Some courts hold that, because the LHWCA specifically defines those workers it intends to cover, trial judges should begin their analysis of the status issue by first looking to see whether the injured worker falls within one of the classifications of employees set forth in that Act. See *Pizzitolo v. Electro-Coal Transfer Corp., supra.* Other courts have indicated that an employee who is defined in the LHWCA should be covered by that statute unless there is proof the worker was a "member of a crew" excluded from LHWCA coverage. See *Duncanson-Harrellson Co. v. Director Etc.,* 686 F.2d 1336 (9th Cir. 1982). Still others, including a different panel of the same Illinois appellate court which decided this case, have begun by first trying to unravel the test of who is a "seaman" within their jurisdiction, while at the same time recognizing that the LHWCA "narrows the original scope of the Jones Act." *Dungey v. United States Steel Corp., supra,* 101 Ill. Dec. at 960, 499 N.E.2d at 548. Finally, some courts have, like the majority in this case, tried to determine whether the Plaintiff falls within the particular definition of "seaman" which has been judicially crafted in their jursidiction, without any reference to the LHWCA at all.

The problem with an approach, of the kind used by the majority of the panel which decided this case, is obvious from the discussion in Part I of this Petition. In 1920, when Congress enacted the Jones Act to apply to any "seaman," the LHWCA did not exist. In 1926, this Court held that the term "seaman" in its broadest sense includes all maritime workers. *International Stevedoring Co. v. Haverty, supra.* Thereafter, Congress passed the LHWCA in 1927, amended it extensively in 1972 to define specifically which categories of workers were covered, and stated that compensation under the LHWCA was henceforth to be the exclusive remedy for all maritime workers except a "master or member of a crew of any vessel." In other words, following enactment of the Jones Act, Congress changed matters so that LHWCA coverage is now, in a sense, the "general rule" and Jones Act coverage is the exception. Given the chronology of development of the two statutes, a court is truly putting the cart before the horse if it tries to define who is a "seaman" under the Jones Act, without first looking to see whether the injured worker falls within one of the categories enumerated in the LHWCA.

The majority opinion of the Illinois appellate court in this case exemplifies both the conflict between the lower courts in defining seaman, as discussed in Part IIA above, and the conflict in approach discussed in this Part IIB.[3]

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[3] The conflict between lower courts in defining "seaman," and the conflict in their basic approach, are of course related. Many jurisdictions crafted their interpretations of "seaman" prior to 1972. At the time, there was little in the way of legislative guidance upon which to rely. Yet many courts continue to mechanically apply their same pre-1972 test today, without re-examining the issue carefully in light of the extensive definitions of employees established by Congress in 1972, and the regulations issued by the Department of Labor thereafter. The fact that *Bassett* and *Senko* were both decided prior to the 1972 amendments further exacerbates the problem.

C. The result: a need for uniformity.

The conflict in determining which test of seaman status should apply, and which approach to use, has resulted in chaos. Private parties cannot predict, with any confidence, how a particular court will rule on the status issue or, therefore, how particular injuries should be processed and compensated. Litigation over the issue has accordingly become frequent, unnecessarily consuming judicial resources. Moreover, the lack of uniformity and guidance is obviously causing confusion and therefore mistakes.[4]

The problems which have developed during this Court's 30-year silence, subsequent to *Senko,* have long been recognized. See Gilmore and Black, The Law of Admiralty (2d Ed. 1975) §6-21 p. 334. The present case represents an opportunity for this Court to go beyond merely defining who is a "seaman,"

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[4] The judge who wrote the majority opinion of the Illinois appellate court in this case noted at the outset of his analysis:

> The first problem is stating a test of seaman's status in the absence of any substantial guidance from the Jones Act or from the United States Supreme Court. 110 Ill.Dec. at 758, 511 N.E.2d at 935.

One U.S. district judge in New Orleans, who was recently trying to interpret the definition of "seaman" in his Circuit, stated in exasperation:

> The Congress which passed the Jones Act would doubtless be amazed to learn that (the plaintiff), a shore-based part time cleaning lady, has now become a 'seaperson,' . . . * * * . . . this Court's inclination is towards a contrary conclusion. Indeed, vesting a shore-based, part time employee who thrice-weekly only cleaned and provisioned a pleasure boat while moored in its yacht-harbor slip, with the peculiar rights and special remedies fashioned to protect the unique interests of those who face the perils of the sea, expands the meaning of the term 'seaman' to new limits.

Lunsford v. Fireman's Fund Ins. Co., 635 F.Supp. 72, 74-75 (E.D.La. 1986).

and to establish a uniform rule for lower courts to apply in determing how maritime workers should properly be compensated for injury, taking into account both the LHWCA and the Jones Act.

Petitioner believes an approach, of the kind set forth in *Pizzitolo v. Electro-Coal Transfer Corp., supra,* would have at least two major advantages. First, it would probably offer the greatest ease of application. As noted previously, Congress did not define the term "seaman" under the Jones Act. However, in the 1972 amendments to the LHWCA, Congress did specify with reasonable clarity, which types of maritime workers were to be covered exclusively by that compensation act. Moreover, the Department of Labor has, at the request of Congress, issued extensive regulations defining in detail which employees are covered by the LHWCA. Using the *Pizzitolo* approach, trial courts could determine readily in most instances whether a worker comes within one of the specifically-defined LHWCA categories. See, e.g., *Thibodeaux v. Torch, Inc.*, 674 F.Supp. 1240 (W.D.La. 1987). Second, a *Pizzitolo*-type approach seems to be most consistent with the intent of Congress. If lower courts are instructed to begin with an examination of the LHWCA definitions, they will be more likely to recognize the fact that Congress intended, through the LHWCA and the 1972 amendments, to broaden LHWCA coverage for port workers and to restrict Jones Act coverage to those who mainly serve aboard vessels on voyages. Also, using the LHWCA as a starting point is logical given the legislative history indicating a congressional preference for automatic compensation benefits, like those provided for in the LHWCA, rather than suits for liability damages under the Jones Act. (See House Rep. No. 1767, 69th Cong. 2d Sess., supra).

A sound analysis should, at the least, require lower courts to consider the LHWCA instead of ignoring it altogether as was done in this case.

CONCLUSION

Congress intended the LHWCA to be the exclusive remedy for workers falling within its coverage. Respondent, a crane operator whose primary duties were to unload rock from barges onto the bank, was expressly defined as a longshoreman by the LHWCA and Department of Labor regulations. He was not a "crewmember of a vessel" as judicially defined by this Court in *South Chicago Coal & Dock Co. v. Bassett* and *Senko v. LaCross Dredging Corp.*

This Court should grant certiorari to review the opinion of the Illinois appellate court, which erroneously found Respondent to be a Jones Act seaman, and should take this opportunity to correct the existing conflicts between circuits by fashioning a uniform approach which would require lower courts to consider the classifications of workers specified in the LHWCA when ruling on the status of injured maritime workers.

Respectfully submitted,

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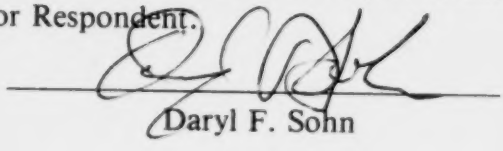
March 18, 1988

CERTIFICATE OF SERVICE

I, Daryl F. Sohn, a member of the Bar of this Court, hereby certify that on this 18th day of March, 1988, three copies of the Petition for Writ of Certiorari in the above-styled case were mailed, first class postage prepaid, to Bruce Cook, Cook, Shevlin, Keefe & Chatham, 12 West Lincoln Street, Belleville, Illinois 62220, counsel for Respondent.



Daryl F. Sohn

APPENDIX

APPENDIX A

IN THE APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 5-86-0583

James Dale,
Plaintiff-Appellee,

vs.

Luhr Bros., Inc.,
Defendant-Appellant.

Appeal from the Circuit Court
of St. Clair County.

Honorable Robert L. Craig,
Judge Presiding.

(Filed: July 29, 1987)

JUSTICE WELCH delivered the opinion of the court:

Plaintiff James Dale commenced this Jones Act (46 U.S.C. §688 (1983)) case in St. Clair County. After a bench trial, the judge found defendant Luhr Bros., Inc. liable to plaintiff in the amount of $1,654,704. Defendant appeals. There is no cross-appeal.

Defendant employed plaintiff as a heavy machinery operator. Plaintiff spent about half his employment for defendant on land and the other half on the water. At the time of his injury plaintiff was in his second week as the second shift dragline operator on the L1000, a 150- to 175-foot-long spud barge engaged in revetment at a construction site on the Illinois bank of the Mississippi River. Since beginning this two-week period plaintiff had no other duties. His work week as dragline operator consisted of six 10-hour days a week. According to the record, the chief difference between a dragline and a crane is that a

dragline's bucket is affixed to the boom by cables rather than by a rigid connection. Revetment, or erosion control, in this case consisted of riprapping or paving the river bank with rock. The L1000 was called a spud barge because of the spuds which held the barge in place on the river bottom. The L1000 was equipped with a winch house and a portable toilet. The remainder of the crew of the L1000 consisted of an oiler responsible for maintenance of the dragline, plus a winchman who controlled the spuds and a laborer who kept the L1000 clean, tied off rock barges brought by a tugboat and "switched out the empties." Plaintiff handled no lines, did not clean or maintain the barge, did not repair leaks or perform any pumping, and did not raise or lower the spuds when the L1000 was moved. When plaintiff worked on the L1000 he ate and slept at home, except for the mid-shift meal which he generally ate on the L1000. The dragline was not affixed to the deck of the L1000. It could be moved about on the L1000 or driven off the L1000 and used on the shore. When plaintiff began a shift on the L1000 he usually rode to the L1000 on the tugboat, the MV Al Bob, which had its own crew. Plaintiff wore a radio with which he kept in constant contact with the MV Al Bob. There were two common means of locomotion of the L1000 during a work shift. Usually the MV Al Bob moved the L1000 with no physical assistance from plaintiff, although plaintiff signalled the tug when plaintiff needed the L1000 moved and told the pilot of the MV Al Bob where to move it. According the defendant's witnesses this method of locomotion was used 90 to 95 percent of the time. On the other occasions, when the MV Al Bob was not available, plaintiff controlled the move by dropping the dragline bucket to the river bed in a direction determined by whether upstream or downstream movement was desired. According to one of defendant's superintendents this method was generally used for movements of no more than 150 feet. Regardless of which method of travel was used, the winchman raised the spuds according to plaintiff's signals consisting of numbered horn blasts, and when the L1000 reached the desired position plain-

tiff signalled the winchman by horn blasts to drop the necessary spuds. According to plaintiff, if the dragline was dragging (cleaning) the bank, the L1000 was moved as often as every 15 minutes and all of the movement, up to "a couple thousand" feet per shift, was accomplished without the aid of the tug. There was also testimony that on occasion dragline operators moved empty rock barges using the dragline bucket.

Plaintiff testified at trial that on July 11, 1983, he was climbing to the dragline's cab to begin his shift when his left foot slipped on the dragline track; he lost his grip on a rope handhold, fell to the deck, and was injured. Apparently the rope was tied to the cab of the dragline by agents or servants of defendants. The manufacturer equipped the cab of the dragline, a Bucyrus-Erie 88B, with a handrail for mounting. Plaintiff's expert witness, Professor Donald Creighton, testified that in his opinion the rope handhold was dangerous because it was made of rope and was not rigid. Professor Creighton, a mechanical engineer, testified he had never seen a crane of this type, never tried mounting the crane using this particular handhold, did not talk to anyone who used it to find out if they thought it was safe, and had never before testified as an expert on the subject of safe access to cranes. Plaintiff testified the rope handle made mounting the dragline easier and he used this method to mount the dragline many times in the past without mishap. Three of defendant's supervisory personnel and seven union-member employees testifed at trial on defendant's behalf, as did one expert witness, a marine surveyor and engineer. One supervisor testified the rope handhold was installed in the late 1970's and was still in use, and no accidents had been attributed to it. The other two supervisors testified the handhold was in use 10 years without problem. Each of the union-member employees testified he used the handhold many times and felt it was safe. Defendant's expert testified that in his opinion based on the trial testimony and his observations made while climbing up and down from the cab of the dragline the handhold was safe and

complied with OSHA (the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 *et seq.* (1983)) regulations. Many of the witnesses described or demonstrated the process of using the rope handle to gain access to the cab, and photcgraphs of the handle and its setting were in evidence at trial.

Evidence at trial indicated plaintiff aggravated a prior injury to his back in the fall. After the fall he underwent surgery to fuse two vertebrae in his lower back. The surgery was only partly successful. An orthopedic surgeon testifying in defendant's behalf stated that in his opinion a second surgery had about an 80 percent chance of success. Another expert medical witness deposed that in his opinion the chance of success was as much as 95% in light of recently developed techniques. This expert was the same surgeon who performed the original surgery. A treating physician deposed was sure plaintiff would be "permanently status quo, pain, cane and unable to work." Plaintiff testified Dr. Vilray Blair at Barnes Hospital told him the prognosis was not good for a second surgery where the first was unsuccessful and that plaintiff might come out worse than he went in. Plaintiff testified he understood there were no guarantees and he did not want to undergo a second surgery under these circumstances.

Defendant argues the trial court erred in concluding plaintiff was a "seaman" (46 U.S.C. §688(a) (1983)) entitled to sue his employer under the Jones Act for negligence. Defendant concedes plaintiff helped move the L1000 but characterizes his help as occasional and comprising a minuscule portion of plaintiff's responsibilities. *Dungey v. United States Steel Corp.* (1986), 148 Ill.App.3d 484, 499 N.E.2d 545, the last word by this court on the issue of seaman status, demonstrates the two central problems with applying the Jones Act to the facts of any particular case.

The first problem is stating a test of seaman's status in the absence of any substantial guidance from the Jones Act or from

the United States Supreme Court. In *Dungey v. United States Steel Corp.* this court followed the test set forth by the Seventh Circuit of the federal court of appeals, reasoning that to do otherwise would result in a test being applied to a case filed in an Illinois circuit court which was different from the test applied if the case were filed in an Illinois federal district court. That test, which we adhere to in the case at bar, is as follows: There is an evidentiary basis for submitting to the trier of fact the question of the injured party's status as a seaman if:

> "(1) the person injured had a more or less permanent connection with a vessel in navigation, and (2) the person injured made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel."

Johnson v. John F. Beasley Constr. Co. (7th Cir. 1984), 742 F.2d 1054, 1062-63, *cert. denied* (1985), 469 U.S. 1211, 84 L.Ed.2d 328, 105 S.Ct. 1180; *Dungey v. United States Steel Corp.* (1986), 148 Ill.App.3d 484, 493-96, 499 N.E.2d 545, 552-53.

The second problem in determining seaman status, that of applying the test, is the more vexing of the two, as demonstrated by *Dungey v. United States Steel Corp.*, in which this court was unanimous as to the test to be applied but disagreed as to its application. A majority of this court concluded Dungey was not a seaman as a matter of law because Dungey's only duties were the oiling of a crane situated on a barge and repair of the boom of the crane; Dungey "performed no work in connection with the transportation function of the barge * * *." (148 Ill.App.3d 484, 495, 499 N.E.2d 545, 553.) In contrast, here plaintiff physically assisted with numerous albeit brief physical movements of the L1000, and was responsible for directing the crew of the L1000 and the pilot of the tug when the L1000 was moved even when the movement was accomplished without plaintiff's physical assistance.

In *Johnson v. John F. Beasley Constr. Co.*, the Seventh Circuit concluded Johnson, an ironworker, was not a seaman. Johnson was employed by a structural steel contractor to work in the removal and replacement of a span of a railroad bridge over the Illinois River. Plaintiff, a foreman in charge of the crew performing the work, was transported daily by tug to a barge used as a work platform in the river channel. The barge supported a large crane used in the removal and erection of structural steel. The barge had no motive power, but was nonetheless a vessel in navigation; a tug moved it downstream where construction material was loaded onto it from trucks on shore with the use of a crane. On such occasions Johnson assisted in the loading and handled lines. *Johnson v. John F. Beasley Constr. Co.* is distinguishable from our case, in which plaintiff physically assisted in moving the L1000 on a regular basis and supervised the moving on a continual basis. Other distinguishable cases urged by defendant for factual comparison include *McSweeney v. M.J. Rudolph Corp.* (E.D.N.Y. 1983), 575 F.Supp. 746 (the plaintiff's deceased was never on the barge when it was moving); *Lynn v. Heyl & Patterson, Inc.* (W.D.Pa. 1980), 483 F.Supp. 1247 (the plaintiff, an ironworker, was aboard the barge on various occasions but did not operate the crane and had no fixed or usual duties with respect to the barge); *Bellomy v. Union Concrete Pipe Co.* (S.D.W.Va. 1969), 297 F.Supp. 261 (the crane the plaintiff operated was on the dock); *Buna v. Pacific Far E. Line, Inc.* (N.D.Cal. 1977), 441 F.Supp. 1360 (held, not a Jones Act "vessel"); *McNeill v. J.E. Brenneman Co.* (E.D.Pa. 1983), 1986 A.M.C. 2241 (same), and *Powers v. Bethlehem Steel Corp.* (1st Cir. 1973), 477 F.2d 643 (the plaintiff performed maintenance on a pier from a raft tied to the pier). We observe little significance in defendant's argument that the dragline could be removed from the vessel and used on land.

In light of the above discussion, we cannot conclude plaintiff's duties were not those of a Jones Act "seaman" as a

matter of law. In our opinion the issue was at most a question of fact for the judge to determine as the finder of fact.

Defendant argues the L1000 was not a "vessel in navigation," citing cases in which a barge used primarily as a construction platform was held not to be such a vessel. The issue was one of fact for the trial judge to determine unless it could be decided as a matter of law. (See *Dungey v. United States Steel Corp.* (1986), 148 Ill.App.3d 484, 489, 499 N.E.2d 545, 549.) The cases defendant cites concern "platforms" unlike the L1000 in configuration or use: *Bernard v. Binnings Constr. Co.* (5th Cir. 1984), 741 F.2d 824 (the parties stipulated the work punt was used solely as "a small work platform"); *Smith v. Massman Constr. Co.* (5th Cir. 1979), 607 F.2d 87 (the plaintiff, a welder, worked upon a floating caisson tethered to the bank while being prepared for incorporation into a bridge column); *Leonard v. Exxon Corp.* (5th Cir. 1978), 581 F.2d 522 (the platform consisting of four barges was moored to the bank); *Cook v. Belden Concrete Products, Inc.* (5th Cir. 1973), 472 F.2d 999 (the moored platform, a barge, moved only along plaintiff's dock), and *Buna v. Pacific Far East Line, Inc.* (N.D.Cal. 1977), 441 F.Supp. 1360 (the plaintiff admitted that "at the present time, the paint float has the function of a floating stage used by defendant's servants who work within the harbor * * *."). The L1000 was not tethered or moored. As equipped it was capable of locomotion and did move itself, not within some harbor or still water but upstream and downstream upon the Mississippi River. In our opinion it could not be said as a matter of law that the L1000 was a mere work platform; the issue was correctly resolved as one of fact. See *Summerlin v. Massman Constr.* (4th Cir. 1952), 199 F.2d 715 (reversing trial court's holding that a fireman on a barge on which a crane was erected was not a seaman upon a vessel engaged in navigation).

Defendant argues plaintiff was injured during his second week aboard the L1000 and thus as a matter of law did not have a "more or less permanent connection" with the L1000. (*John-*

son v. John F. Beasley Constr. Co. (7th Cir. 1984), 742 F.2d 1054, 1063, *cert. denied* (1985), 469 U.S. 1211, 84 L.Ed.2d 328, 105 S.Ct. 1180; *Dungey v. United States Steel Corp.* (1986), 148 Ill.App.3d 484, 493-96, 499 N.E.2d 545, 552-53.) The issue was one of fact for the trial judge to determine unless it could be decided as a matter of law. (See *Dungey v. United States Steel Corp.* (1986), 148 Ill.App.3d 484, 489, 499 N.E.2d 545, 549.) On this evidence the trial court was entitled to conclude plaintiff was injured during the second week of a more or less permanent assignment aboard the L1000, as there was no affirmative evidence that plaintiff's assignment was of a lesser duration. (See *Longmire v. Sea Drilling Corp.* (5th Cir. 1980), 610 F.2d 1342, 1347 n.6 ("Our holding on this issue should not be taken to mean 'once a platform worker, always a platform worker,' nor that one who has been a platform worker cannot become a seaman until he has been working as a seaman for some time. * * * What it to be avoided is engrafting upon the statutory classification of a 'seaman' a judicial gloss so protean, elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his regular duties.") We conclude the issue was properly resolved as one of fact.

Defendant argues the trial court erred in finding defendant negligent. This court will not disturb a trial court's finding and substitute its own opinion unless the finding is against the manifest weight of the evidence. Especially where the evidence is contradictory, the trial court is in a superior position to weigh the evidence and determine the preponderance thereof. (*Schulenburg v. Signatrol, Inc.* (1967), 37 Ill.2d 352, 256, 226 N.E.2d 624, 626.) The finding of negligence was supported by photographic exhibits of the accident scene including the rope handhold, by numerous descriptions and demonstrations of the process of entering the dragline cab and by expert testimony that the handhold was unsafe. Plaintiff's contention, accepted by the trial court, was that use of the rope handhold exerted a horizontal force on the user's body so that a loss of grip natural-

ly resulted in the user landing on his back instead of his feet, and that this was what happened to plaintiff. There was expert and lay testimony that the handhold was safe, but the credibility of the witnesses and the weight of the testimony are for the trier of fact to determine.

Defendant argues the award of damages was excessive. The trial court found the 38-year-old plaintiff permanently unemployable as an operating engineer, that plaintiff's refusal to have additional surgery was not unreasonable in light of its poor prognosis, and that plaintiff's condition was extremely painful and seriously inhibited his recreational, social and family activities. The parties stipulated plaintiff's medical expenses as of trial were $24,593.91. An economist testified plaintiff lost past wages of $78,424 and would lose future wages with a present value of as much as $684,936 based on certain stated assumptions. The court accepted these wage loss figures, assessed plaintiff's damages to be $2,363,862 (*i.e.*, three times the sum of medical expenses and lost past and future wages) and reduced that amount by 30 percent to reflect plaintiff's contributory negligence to that extent.

A reviewing court will not disturb a trial court's findings as to damages unless against the manifest weight of the evidence. (*Pathman Constr. Co. v. Hi-Way Elec. Co.* (1978), 65 Ill.App.3d 480, 490, 382 N.E.2d 453, 461.) Defendant argues the trial court should have reduced plaintiff's damages in light of evidence that plaintiff might be able to work again as a heavy equipment operator after surgery. In light of the evidence that another surgery might worsen plaintiff's condition, we do not believe the trial court was obligated to accept defendant's contention that plaintiff was in effect obligated to opt for the second surgery. We are mindful as was the trial court of defense counsel's thorough cross-examination of plaintiff's expert witness on the subject of future lost wages. However, the weight of that testimony and the credibility of that witness were for the trier of fact to determine. See *People v. Bilyew* (1978), 73 Ill.2d 294, 302, 383 N.E.2d 212, 215.

For the foregoing reasons, the judgment of the circuit court of St. Clair County is affirmed.

AFFIRMED.

HARRISON, J., CONCURRING.

KARNS, P.J., dissenting:

I find it difficult to equate the duties of plaintiff, a member of the Operating Engineers Union, with those of a ship's captain. The work barge had no motive power and obviously could only be moved downstream by flotation when the mooring spuds were removed.

Assuming the barge to be a vessel in navigation, a matter not free from doubt, I do not consider plaintiff to be a seaman. We recently reviewed the cases dealing with seaman status in *Dungey v. United States Steel Corp.* (5th Dist. 1986), 148 Ill.App.3d 484, 499 N.E.2d 545. There, the plaintiff, a member of the Operating Engineers Union, worked as an oiler on a construction crane affixed to a work barge in the Mississippi River. The barge had no motive power but was occasionally moved a few feet downstream by manipulating mooring spuds. We adopted the test of *Johnson v. John F. Beasley Construction Co.* (7th Cir. 1984), 742 F.2d 1054. A seaman is one who is a master or member of the crew of a vessel in navigation whose duties make a *significant* contribution to the transportation function of the vessel.

I would conclude that our disposition in *Dungey* would dispose of plaintiff's status in the instant case.

APPENDIX B

IN THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
ST. CLAIR COUNTY, ILLINOIS

NO: 83-L-787

James Dale,
Plaintiff,

vs.

Luhr Bros., Inc.,
Defendant.

ORDER

(Filed: July 28, 1986)

This cause came before the Court for hearing as a bench trial on April 28, 1986. Witnesses were sworn, testimony was heard, exhibits were received. Having carefully considered the admissible testimony and evidence, the Court makes the following findings and enters the judgment hereinafter set forth.

Plaintiff brings this action pursuant to the Jones Act, Title 46, Section 668, U.S.C. Plaintiff was an employee of defendant, Luhr Bros., Inc. A crucial issue, therefore, is whether or not plaintiff was a seaman within the meaning of the Jones Act and the General Maritime Law of the United States at the time he suffered his injuries.

Narrowly stated, plaintiff's principal duty in the course of his employment was to operate a dragline crane mounted on defendant's barge, known as the L-1000. The L-1000's function was to transfer rock from a rock barge for revetment of the shoreline of the Mississippi River near the mouth of the Kaskaskia River. However, the evidence adduced at the trial of this case discloses that plaintiff performed many other responsi-

ble duties in connection with the function of the barge L-1000 and other vessels appurtenant thereto. A careful review and consideration of all the testimony convinces this Court that plaintiff was a seaman under the traditional criteria expressed by Justice Welch of our Appellate Court in *Berry v. American Commercial Barge Lines*, 114 Ill.App.3d 354, 71 Ill. Dec. 1, 450 N.E.2d 436 (5th District 1983) (reflecting the view of the most prominent federal authority [*Offshore Co. v. Robinson*, 266 F.2d 769, (5th Circuit)], or even under the arguably more restrictive criteria set forth in *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 [7th Circuit]).

To be a seaman within the meaning of the Jones Act and the General Maritime Law, plaintiff must show the following:

(1) That he was injured upon a vessel in navigation; and,

(2) That he was aboard primarily to aid in navigation; and,

(3) That he had a more or less permanent connection with the vessel or with a specific group or fleet of vessels. (*Berry*, supra, 114 Ill.App.3d 354, 359, 71 Ill. Dec. 1, 5, 450 N.E.2d 436, 440.)

The Court in *Berry* also stated that in order to meet the requirement that a crew member's duties be "primarily in aid of navigation," all that is necessary is that the duties of the plaintiff must have contributed to the vessel's function or the accomplishment of its mission." (*Berry*, supra, 114 Ill.App.3d 354, 361, 71 Ill. Dec. 1, 7, 450 N.E.2d 436, 442.) As recently as last year, the Fifth Circuit Court of Appeals held that a drilling rig inspector was correctly found to be a seaman as a matter of law because "(t)he work he performed contributed to the function of the vessel as to the accomplishment of its mission . . . " (*Tulos v. Resource Drilling*, 750 F.2d 380, 384, 5th Circuit 1985).

Plaintiff has suggested in his post-trial memorandum that the Court in *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, (7th Circuit 1984) adopted more restrictive criteria for determining whether or not a plaintiff is a seaman, to wit, in that: " . . . the person injured made a significant contribution to the maintenance, operation or welfare of the transportation function of the vessel." (*Johnson*, 742 F.2d at 1063.) (cf: *Barret v. Chevron U.S.A., Inc.*, 781 F.2d 1067 [5th Cir. 1986], following *Robinson* and rejecting *Johnson*, and *Tulos v. Resource Drilling*, 750 F.2d 380 [Cir. 1985].) As the Court has already stated, the Court is convinced that the plaintiff herein meets the criteria set forth in *Johnson* as well as the traditional criteria explicated in the other cases cited.

Michael Habel, Luhr Brother's Vice President of Insurance and Safety, testified when called by plaintiff under Section 2-1102 of the Illinois Code of Civil Procedure that Luhr Brothers owns 20 tugboats of various sizes, that Luhr Brothers owns or operates approximately 200 barges, including eight barges purchased for revetment work. A revetment job required two barges — a spud barge with a crane mounted thereon, such as was depicted in Plaintiff's Exhibit No. #4, and a rock barge. The rock barge would be tied off to the spud barge; the crane on the spud barge transferred rock from the rock barge to the shoreline for bank stabilization or revetment. A spud barge crew consisted of four men. An operator (plaintiff in this particular case) and an oiler were assigned to the dragline, a laborer was assigned to the barge to keep the barge clean, to clean up grease and other foreign substances, and a winch operator whose primary duty was to lower the spuds on the spud barge to the river bed to keep the barge in a fixed location, and to raise them upon being signalled to do so by the crane operator when it became necessary to move to a different location.

A tugboat, the Al Bob in this particular case, would transport the barge crew from the shore to the barges and back during

shift changes. Also, the Al Bob was ordinarily used to move the barges from one location to another. However, plaintiff testified that if the tugboat was not around when it became necessary to move the barge, he would have the spud operator pull the spuds and move the barge to a new location by throwing the dragline bucket out in the river and in effect drag the barge to a new location. Gene Gerris, a Luhr Brothers' river superintendent, testified that if the rock barge needed to be moved, 90% of the time the Al Bob would move it, and 10% of the time they would raise the spuds and let it move on downstream. Ben Jackson, another Luhr Brothers' dragline operator, testified that he occasionally moved the rock barges with the bucket of the dragline. James Lampert, the evening shift operator of the Al Bob, testified that he normally moved the L-1000 spud barge. Lampert testified that the spud barge was in his sight 95% of the time, and that the spud barge moved itself 5% of the time. Lampert also testified on cross examination that he had been tied off to the spud barge when the spud barge would move itself and his boat.

Jerry Pearson, plaintiff's direct supervisor, testified that normally the boat would move the barge if it was there. He further testified that the tug moved the barge at least 75% to 80% of the time; if it was being moved up river, it normally had to be moved by the tug. The crane operator would normally work off of the bank when moving the barge because if the barge gets in deep water the operator cannot control it.

Having considered the testimony of all the witnesses, the Court concludes, and so finds, that the plaintiff was, in fact, injured upon a vessel in navigation, and that he was aboard primarily to aid in navigation. With regard to whether plaintiff had a more or less permanent connection with the vessel as a group or fleet of vessels, plaintiff testified that he had been a crane operator from 1978 to the time of his injury. He testified that since he had been an operator, he had worked on bridges, the Mississippi River, the Kaskaskia River, and on the Alton

Lock and Dam project. Plaintiff had worked on this particular project approximately two months, part of the time as a master mechanic. Plaintiff estimated that 25% of his work in the last four to five years had been off the river. The Court, therefore, finds that plaintiff had a more or less permanent connection with the L-1000, and in fact it appears from plaintiff's testimony that he had a more or less permanent connection with defendant's fleet of barges.

The Court also finds that plaintiff made a significant contribution to the transportation function of the L-1000. As previously noted, the evidence shows that the L-1000's function was to transfer rock from an adjacent rock barge to the shore of the Mississippi River for bank stabilization. Plaintiff frequently moved the L-1000 and its rock barge from one location to another by use of the dragline. When the vessel was to be moved, the spuds were lifted at his direction, and even when the switch boat, The Al bob, was present to move the barges, any movement made by it was done at plaintiff's request and direction.

Plaintiff suffered a severe back injury when he fell while attempting to mount the Bucyrus-Erie 88-B dragline on the L-1000 by means of a rope defendant had affixed to the dragline. The rope caused persons mounting the dragline to lean out to obtain leverage in the process of elevating themselves to the top of the dragline's tracks, which were relatively slick. It is undisputed that the manufacturer of the 88-B provided a method of mounting the crane by use of a step and handhold (Plaintiff's Exhibit No. 7, Defendant's Exhibit No. E-2). It is also undisputed that the 88-B's manufacturer had nothing to do with the defendant's use of a rope to mount this crane — the rope was defendant's idea. It is this Court's opinion based on all the evidence, and the Court so finds, that to use a non-rigid rope as a handhold for mounting this crane was very dangerous (Defendant's Exhibit E-2 - E-14) and constituted negligence. It

is equally clear to this Court that plaintiff was aware of the mount/dismount system provided by the manufacturer, and his use of the alternate provided by defendant constituted contributory negligence (indeed, plaintiff conceded in argument and in a letter to the Court subsequent to his post-trial memorandum that he could be found contributorily negligent).

The Court has reviewed the medical testimony and finds that plaintiff is permanently unemployable as an operating engineer as the result of his fall, the failed spinal fusion and the consequent pseudoarthrosis. The Court carefully observed plaintiff during his testimony at trial and it is apparent that his back condition is extremely painful. Plaintiff takes Tylenol III (with codeine) three times a day and takes Percodan at night if necesary to relieve his pain, which he described as like sticking a knife in him. Plaintiff is unable to walk without the use of his cane, and his day-to-day activities are severely restricted. Although there was medical testimony that additional surgery on plaintiff's back might be successful, plaintiff perhaps put it most succinctly when he testified that people at Barnes Hospital had told him that a second operation might make him better, might make him worse, or leave him the same. Plaintiff said he considered such a prognosis as giving him "about a 33% chance." Plaintiff's refusal to have additional surgery is not unreasonable in light of its poor prognosis.

The Court finds, based on the medical evidence, that plaintiff suffers and will continue to suffer permanent and substantial pain and disability proximately caused by the accident here in question. The Court further finds that plaintiff's disability has consequences reaching beyond physical incapacity to work; plaintiff's injury seriously inhibits and restricts his recreational, social and familial activities, all of which affects the amount of plaintiff's damages.

The Court is not unmindful of defendant's thorough cross examination of Dr. Leroy Grossman, plaintiff's economist, nor

the evidence presented by defendant on the question of plaintiff's future employment capabilities and potential lost wages. Therefore, the Court finds that Dr. Grossman's testimony provides the best measure of plaintiff's future lost earnings. Assuming that plaintiff would have worked until age 66, Grossman placed the present value of plaintiff's future lost earnings at $684,936. Grossman calculated plaintiff's lost earnings from the date of his injury to March 31, 1985, at $78,424. The parties stipulated that plaintiff's medical expenses to the date of trial amounted to $24,593.91.

The court assesses plaintiff's damages at $2,363,862. The Court finds that plaintiff was guilty of contributory negligence in a comparative amount of 30%. The Court, therefore, enters judgment for plaintiff and against defendant in the sum of ONE MILLION SIX HUNDRED FIFTY FOUR THOUSAND SEVEN HUNDRED FOUR DOLLARS ($1,654,704) plus costs of this action.

DATED This 28th day of July, 1986.

ENTER:

/s/ Robert L. Craig
Associate Circuit Judge

APPENDIX C

IN THE APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 83-L-787

James Dale,
Plaintiff-Appellee,
Cross-Appellant,

vs.

Luhr Bros., Inc.,
Defendant-Appellant,
Cross-Appellee.

Appeal from the Circuit Court
of St. Clair County.

ORDER

(Filed: August 18, 1987)

This cause having been considered on appellant's petition for rehearing and application for certificate of importance and the court being fully advised in the premises:

IT IS THEREFORE ORDERED that appellant's petition for rehearing and application for certificate of importance shall be, and the same hereby are, DENIED.

APPENDIX D

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

December 22, 1987

Goldstein & Price
Attorneys at Law
818 Olive St., S#1300
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No. 65787 - James Dale, respondent, v. Luhr Bros., Inc., petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on January 13, 1988